

This is the third edition of the Eversheds Sutherland SALT Scoreboard for 2023. Since 2016, we have tallied the results of what we deem to be significant taxpayer wins and losses and analyzed those results. Our entire SALT team hopes that you have found the SALT Scoreboard's content useful. This edition includes discussions of forced combined reporting and a state False Claims Act, as well as a spotlight on Ohio cases.

3rd quarter 2023

In the third quarter of 2023, taxpayers prevailed in 42.5% (17 out of 40) of the significant cases.* Taxpayers won 44.4% (4 out of 9) of the significant corporate and franchise income tax cases and 38.5% (5 out of 13) of the significant sales and use tax cases.



*Some items may have been decided in a prior quarter but included in the quarter in which we summarized them.

Year-to-date

Taxpayers prevailed in **4** out of **9** significant corporate income and franchise tax cases across the country

Taxpayers prevailed in **5** out of **13** significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Combined Reporting

CASE: *Tractor Supply Co. v. South Carolina Department of Revenue*, No. 19-ALJ-17-0416-CC (S.C. Admin. Law Ct. Aug. 8, 2023).

SUMMARY: The South Carolina Administrative Law Court held that the South Carolina Department of Revenue could require a retailer and its affiliates to file a combined return notwithstanding that South Carolina law requires corporate taxpayers to file tax returns on a separate-entity basis. In a factually intensive ruling, the ALC found that combined reporting was a reasonable alternative method that fairly reflected the combined group's business activity in the state. The ALC noted that the taxpayer's expert admitted that the taxpayer's original transfer pricing methodology was "flawed and unreliable" and its proposed alternative transfer pricing approach was not based on sufficient evidence. [View](#) more here.

Apportionment

CASE: *In the Matter of the Appeal of Southern Minnesota Beet Sugar Co-op.*, 2023-OTA-342P (Cal. OTA Mar. 17, 2023), petition for rehearing denied 2023-OTA-343 (Cal. OTA June 6, 2023).

SUMMARY: The California Office of Tax Appeals ruled that payroll, property and sales that generated deductible agricultural cooperative income under Cal. Rev. & Tax. Code § 24404 must be included in the taxpayer's corresponding payroll, property and sales factors. Looking to the plain language of the governing apportionment statutes, the OTA concluded that there were no grounds to exclude activities that give rise to apportionable business income, whether or not deductible. The OTA drew a distinction between income that is deducted and income that is "exempted," "excluded" or "not recognized" under the terms of the Revenue and Taxation Code, the latter of which "generally do not enter into gross income (or gross receipts) to begin with." [View](#) more here.

Aircraft Exemptions

CASE: *Citation Partners, LLC v. Wisconsin Department of Revenue*, 985 N.W.2d 761 (Wis. 2023).

SUMMARY: The Wisconsin Supreme Court held that portions of lease payments earmarked for aircraft repairs and engine maintenance were not exempt from sales tax under the exemption for sales of aircraft parts and maintenance. The taxpayer leased an aircraft to customers. Under the lease, the taxpayer was required to pay third-party vendors for repairs and maintenance of the aircraft and the customers were required to reimburse the taxpayer for their share of the repair and maintenance cost. The court concluded that customer payments were not exempt reimbursements, but were instead part of the sales price, against which no deductions were permitted. In reaching its conclusion, the court distinguished between businesses that sold repair parts and maintenance directly to customers, and those which, like the taxpayer, passed on the costs to their customers. [View](#) more here.

Spotlight on Ohio cases



CASE: *Jones Apparel Group, et al. v. McClain*, Case Nos. 2020-53, 2020-54 (Ohio Bd. Tax App. Sept. 13, 2023).

SUMMARY: The Ohio Board of Tax Appeals held that a taxpayer failed to meet its Commercial Activity Tax (CAT) burden of proving that its sales of goods were distributed outside of Ohio. The taxpayer, an apparel dealer, had shipped products to Ohio-based distribution centers of major retailers and paid the CAT for all items shipped to the distribution centers, even those that were ultimately received by customers outside of Ohio. Subsequently, the taxpayer filed refund claims for products shipped outside the state, which were denied by the Department because the taxpayer's documentation did not show the products' ultimate destination. On appeal to the Ohio Board of Tax Appeals, the taxpayer provided a report showing the distribution of products through one of the retail customer's stores. While the Board rejected the Department's argument that the taxpayer must have contemporaneous knowledge of the ultimate destination of the product at the time it is transported, it refused to rely on the taxpayer's documentation because it was related to a time well after the tax period and "extremely short" in comparison. [View](#) more here.

CASE: *Stingray Pressure Pumping LLC v. Harris*, No. 2023-Ohio-2598 (Ohio Aug. 2, 2023).

SUMMARY: The Ohio Supreme Court held that much of a taxpayer's equipment used in fracking was exempt from sales and use tax as equipment used directly in the production of oil and gas. Prior to analyzing the equipment, the court refused to construe tax exemptions against the taxpayer: "Our task is not to make tax policy

False Claims Act

CASE: *People ex rel. Stephen B. Diamond PC v. Henry Poole & Co., Ltd.*, 2023 IL App (1st) 220195 (Ill. App. Ct. June 30, 2023) (unpublished).

SUMMARY: The Illinois Appellate Court upheld an order granting summary judgment in favor of a United Kingdom tailoring company, defending against a relator's claim under the state's False Claims Act. The relator claimed that the company knowingly failed to collect and remit taxes under the Illinois Retailer's Occupation Tax Act and Use Tax Act when company representatives met with the relator's son in Chicago and later shipped an order into Illinois. The lower court granted summary judgment in favor of the company, finding that the company lacked the requisite scienter under the False Claims Act. Although the appellate court found that the company failed in its obligation to conduct an investigation as to its tax obligations, the appellate court ultimately concluded that the company's limited nexus to the state supported the circuit court's holding that the company did not act with reckless disregard. [View](#) more here.

but to provide a fair reading of what the legislature has enacted: one that is based on the plain language of the enactment and not slanted toward one side or the other." The court held that the various items qualified for the exemption because the items were used in performing hydraulic fracking services. However, the court rejected the exemption as applied to a van used as a mobile command post because it was "not used in the fracking process in the same way as the other items-it does not act directly on the 'fluid and material.'"

CASE: *PCM, Inc. v. Harris*, No. 2023-Ohio-2974 (Ohio Aug. 29, 2023).

SUMMARY: The Ohio Supreme Court affirmed a use tax assessment on items included in the construction of taxpayer's data center. The auditor had determined that the items must be taxed to the owner of the data center, rather than to the entity that constructed it, because "the items constituted the acquisition of 'business fixtures/tangible personal property,' rather than real property." The taxpayer asserted that the relevant taxes were already included in the billings paid by the constructing entity to its vendors. On review, the court found that the taxpayer "cite[d] no authority for the proposition that the payments have any legal significance that would affect [the taxpayer's] use-tax liability." Further, Ohio's tax statutes lack any "provision for crediting taxes paid by one consumer to the account of another." The taxpayer also forfeited the right to have the court consider the taxability of various items "[b]y failing to object to the taxability of the items in its petition for reassessment or in another writing filed before the date of the tax commissioner's final determination."

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